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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Application of

BENCHMARK COMMUNICATIONS CORPORATION

For Construction Permit for a New
FM Station to Operate on Channel 291C3
in Chatom, Alabama

TO: Roy J. Stewart, Chief
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
File No. BPH-891228MT

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FM EXAMINATION

SUPPLEMENT TO PETITION TO DENY

1. Charles Esposito d/b/a Hap-Hazard Broadcasting ("Hap-Hazard") hereby supplements its petition to deny the above-captioned application to include the following information.^{1/} As set forth below, Benchmark's willingness to play fast and loose with the truth -- a characteristic noted by Hap-Hazard in its April 11, 1991 Petition to Deny and its May 13, 1991 Reply to Benchmark's Opposition to Petition to Deny -- has again been illustrated very recently in its application (File No. BAL-930528EA) for consent to the assignment of the license of Station WBCA(AM), Bay Minette, Alabama.

2. As the Commission will recall, Benchmark was at one time the permittee of Station WCCJ(FM), Chatom, Alabama. It failed to construct that station, and its permit was cancelled by letter (Ref. 8920-MW) of Larry Eads, Chief, Audio Services Division, dated January 19, 1989. In cancelling the permit Mr. Eads specifically noted that "there

^{1/} As set forth below, the supplemental information involves an application filed by Benchmark Communications Corporation ("Benchmark") in late May, 1993. As a result, no discussion of that application was possible in Hap-Hazard's original Petition, which was filed in April, 1991, more than two years before the latest Benchmark application was filed.

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appear to be several misrepresentations with respect to construction progress made by Benchmark. . . . We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast Station in the public interest."

3. Later, Benchmark filed an application for a new FM station in Highlands, North Carolina. That application was designated for hearing on a variety of issues, including a misrepresentation/lack of candor issue related to Benchmark's basic qualifications to be a licensee. *See Mountain-High Broadcasters, Inc.*, 6 FCC Rcd 3 (Audio Services Division 1991). Those issues were directed to Benchmark's apparent misrepresentations to the Commission in connection with its applications for extension of the Chatom permit. Those issues were *not* resolved in the Highlands case, however, because Benchmark elected not to prosecute its Highlands application.^{2/} As a result, the serious questions of Benchmark's basic qualifications, first raised in the Chatom matter and later formally designated with respect to the Highlands application, have never been resolved.

4. Meanwhile, Benchmark was busy trying (with the above-captioned application) to get a second chance at the Chatom permit which it had already held, without constructing, for almost four years before the permit was cancelled in 1989. Hap-Hazard filed a timely petition to deny that application, noting *inter alia* the still-unresolved character issues. Benchmark opposed Hap-Hazard's Petition and, in so doing, raised even further questions about its honesty and candor before the Commission. Those matters were addressed in Hap-Hazard's Reply to Benchmark's Opposition. And there the matter has sat for some two years.

^{2/} See Memorandum Opinion and Order, FCC 91M-1391, Mimeo No. 4019, released April 23, 1991 at 2 ("[T]he application of Benchmark Communications Corporation . . . IS DISMISSED with prejudice for failure to prosecute.").

5. On May 28, 1993, Benchmark filed an application (File No. BAL-930528EA) for consent to the assignment, to Benchmark, of the license of Station WBCA(AM), Bay Minette, Alabama.^{3/} That application contains an extensive discussion of the Chatom situation. A copy of the exhibit containing that discussion is included as Attachment A hereto. As the Commission will note, that discussion bears little resemblance to reality. For example, with respect to Mr. Eads' letter, it merely says that that letter "denied Benchmark's application for extension of time to construct WCCJ"; it makes no reference to Mr. Eads' statement clearly indicating that the Commission had tentatively concluded that Benchmark was guilty of misrepresentations to the Commission.

6. Similarly, in describing the Highlands proceeding, Benchmark refers merely to "issues to determine whether Benchmark had accurately described its Chatom construction efforts". Needless to say, the words "misrepresentation" and "lack of candor" do not appear, even though the primary issue designated against Benchmark was directed specifically to whether Benchmark had

made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission.

6 FCC Rcd 3, ¶5. Further, the WBCA(AM) application suggests that Benchmark's Highlands application was dismissed as a result of a settlement, rather than for Benchmark's

^{3/} Curiously, by letter dated June 11, 1993, the licensee of Station WBCA(AM) advised the Commission that it was requesting that, "in the event an application is filed by Benchmark Communications Corporation for assignment of license, said application be dismissed. [The WBCA(AM) licensee] has decided not to sell the assets of Station WBCA(AM) to Benchmark Communications." The WBCA(AM) assignment application was subsequently dismissed. In light of the relatively strange letter requesting dismissal "in the event an application is filed", the circumstances surrounding the preparation and submission of the WBCA(AM) assignment application are far from clear and may raise further questions about Benchmark's activities before the Commission.

failure to prosecute.

7. But most surprising is Benchmark's treatment of the problems which underlie the misrepresentation issue. Benchmark opens that discussion by saying

Benchmark has already explained itself at great length, most notably in (1) its May 26, 1988 amendment to its Chatom extension application and (2) its March 2, 1989 petition for reconsideration of the cancellation of its permit.

See Attachment A hereto. Benchmark then proceeds to put a gloss on the overall allegations without addressing any details.

8. Of course, Benchmark's gloss is entirely self-serving and unpersuasive when compared with the actual factual claims and assertions which got Benchmark in trouble in the first place.^{4/} Particularly noteworthy is the fact that Benchmark's discussion contains absolutely no reference to Hap-Hazard's Petition to Deny, Benchmark's Opposition thereto, or Hap-Hazard's Reply. But those pleadings -- and especially the latter two -- contain significant factual information about Benchmark's repeated contradictions of its own story. That is, as late as April-May, 1991, Benchmark was still coming up with new twists and turns which effectively established that Benchmark had made multiple misrepresentations in its previous submissions to the Commission. Hap-Hazard refers the Commission in particular to Pages 3-13 of its May 13, 1991 Reply for a detailed discussion of the continuing shifting nature of Benchmark's story. Benchmark's failure to reference these matters (and its

^{4/} Interestingly, in its WBCA(AM) application, Benchmark notes parenthetically that "(It should be kept in mind that Benchmark filed its [allegedly misrepresentative] extension application *pro se.*)". *See* Attachment A. With this statement Benchmark seems to be suggesting that it is permissible (or at least more acceptable) for an applicant to lie to the Commission if the applicant does so without counsel. Such a suggestion is, of course, wrong-headed. While some aspects of the Commission's rules and policies may be arcane or technically complex and may, therefore, be more easily or thoroughly understood with the guidance of expert counsel, that is not the case with the Commission's policy on misrepresentation. That policy may be stated quite simply: the Commission expects its applicants to tell the truth. It is difficult to see why Benchmark might have needed counsel to understand that basic notion.

decision, instead, to direct the Commission's attention to Benchmark's 1988 and 1989 submissions) raise further serious questions about Benchmark's candor before the Commission.

9. The WBCA(AM) assignment application thus underscores the serious unresolved questions which still remain relative to Benchmark. Benchmark's glib, self-serving, less-than-forthcoming gloss on the facts in that application effectively demonstrates that, far from having learned its lesson when it lost the Chatom permit the first time, Benchmark is still ready, willing and able to shade (or even misstate) the truth before the Commission.

10. The WBCA(AM) application also demonstrates that Benchmark is not inclined to comply with the Commission's *ex parte* rules. *See generally* Sections 1.1200 *et seq.* of the Commission's rules. The question of Benchmark's basic qualifications is certainly an issue which has been formally raised by Hap-Hazard in its petition to deny Benchmark's above-captioned application. Thus, that application, and the questions inherent in it, constitute a "restricted proceeding" subject to the *ex parte* rules. *See* Section 1.1208(c)(i)(B). And the substance of the discussion in the WBCA(AM) application concerning the Chatom application is unquestionably "directed to the merits or outcome" of the Chatom proceeding.^{5/} Moreover, that discussion contains an offer to the Commission of still further *ex parte* communications ("should additional information be desired, Benchmark's president will make himself available to the staff to answer any questions that may remain").

^{5/} *See* Attachment A hereto (which contains the statement "the questions about Benchmark's efforts and representations should be resolved favorably to Benchmark").

11. In Hap-Hazard's view, since Hap-Hazard was not served with a copy of the application by Benchmark, the WBCA(AM) application constitutes a serious violation of the *ex parte* rules which raises still further serious questions about Benchmark's basic qualifications to be a licensee. Indeed, in view of the fact that even the supposed assignor of Station WBCA(AM) apparently did not want the WBCA(AM) assignment application filed, *see* Footnote 3, above, the Commission might legitimately ask why that application was filed by Benchmark at all if it was not to influence the ultimate resolution of the misrepresentation issue. ^{6/}


12. Benchmark's WBCA(AM) application thus aggravates the already aggravated questions concerning its qualifications to be a licensee. Tragically, the on-going, unresolved saga of Benchmark has had an adverse effect on the *public*, as Benchmark has now managed to deprive the public in Chatom, Alabama of its first local FM service for more than eight years. As Hap-Hazard has argued in its Petition to Deny, however, that unfortunate logjam could easily be broken if the Commission would simply recognize that Benchmark's above-captioned application could not properly have been accepted as an application for a new station in view of the fact that, as specifically indicated in the application, that application sought modification of a construction permit which was not at that time outstanding and which has not since been reinstated. As the Commission is aware, Hap-Hazard has filed an application for the Chatom channel, which application would be eligible for "first-come, first-serve" consideration if the Benchmark application were

^{6/} One possible explanation for Benchmark's WBCA(AM) application, of course, would be that Benchmark wanted to try to secure some favorable resolution of the misrepresentation issues by attempting to secure a quick grant of what likely would have been a non-controversial application containing some general (albeit inaccurate and far from complete) mention of those issues. Query as to whether such a back-door approach would constitute an abuse of the Commission's processes.

dismissed.^{2/}

13. Hap-Hazard remains prepared to construct and operate a new station on the Chatom channel if granted by the Commission, and Hap-Hazard encourages the Commission to act favorably on Hap-Hazard's petition for reconsideration, reinstate Hap-Hazard's application, dismiss Benchmark's application, and take appropriate action to see to it that the listening audience in Chatom is not deprived of local FM service for another eight years.

Respectfully submitted,


/s/ Harry F. Cole
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Hap-Hazard Broadcasting

July 22, 1993

^{2/} Hap-Hazard's application was dismissed by the Commission by letter (Ref. 8920-CA) of Mr. Eads dated June 26, 1991, because of the determination that Benchmark's application was acceptable for filing. Hap-Hazard filed a timely petition for reconsideration of that dismissal and that matter is, to the best of Hap-Hazard's knowledge, still pending.

ATTACHMENT A

Exhibit II to the
Application (File No. BAL-930528EA) for consent
to the assignment of license of Station WBCA(AM),
Bay Minette, Alabama

(This application was obtained from the Commission's files.)

ASSIGNEE'S BROADCAST INTERESTS

The sole principals of Benchmark Communications Corporation are John Raymond Meyers, Earl Lyle Miller, Nancy B. Miller and Clarence R. Brelsford.

Mr. Meyers is employed as a staff engineer with the Dade County Public Schools, licensee of non-commercial educational stations WLRN(FM) and WLRN(TV), Miami, Florida, and has held that position from February 1981 to the present.

Earl Lyle Miller is chief engineer of Summit Radio Corporation, licensee of Station WAKC(TV), Akron, Ohio, and has held that position from October 1979 to the present. The Millers are husband and wife.

Nancy B. Miller and Clarence R. Brelsford have no other broadcast interests.

Key Largo, Florida. Benchmark and its president, John Raymond Meyers, were principals in Key Largo Broadcasters, which filed for channel 280A at Key Largo, Florida, File Number BPH-830725AG. After designation for hearing, Key Largo Broadcasters voluntarily withdrew its application in order to pursue other broadcast opportunities.

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Gulf Breeze, Florida. Benchmark was a limited partner in Gulf Breeze Wireless Co., Ltd., applicant for a new channel 237A FM at Gulf Breeze, Florida (File No. BPH-850301MB). Clarence Brelsford's daughter-in-law, Barbara Brelsford, was the general partner and his son, Michael Brelsford, was a limited partner. After designation for hearing, Gulf Breeze Wireless Co., Ltd.'s application was dismissed with prejudice by the Administrative Law Judge and returned.

Marco, Florida. In 1985 Benchmark filed an application for a new FM at Marco, Florida. The application was deemed incomplete by the Commission and was returned.

Chatom, Alabama. Also in 1985 Benchmark acquired the construction permit for new class A FM station WCCJ, Chatom, Alabama. By letter of January 19, 1989 the Commission denied Benchmark's application for extension of time to construct WCCJ.¹ Benchmark disputed the Commission's conclusion that it had not made diligent efforts to construct, and sought reconsideration of the cancellation.

Subsequently, the Chatom allotment was upgraded to class C3. Benchmark filed for the modified allotment, alternatively as an upgrade for WCCJ (should its original permit be reinstated upon reconsideration) or as an application for a new construction

¹ FCC File No. BMPH-880325JC. The extension application was originally granted on May 31, 1988, but the grant was rescinded by letter of June 9, 1988.

permit.² Still later, following discussions with the staff about how best to expedite activation of a first local broadcast service for Chatom and Washington County, Benchmark withdrew its petition for reconsideration with respect to the class A permit.

However, in the meantime Benchmark's application for a new FM station in Highlands, North Carolina, was designated for comparative hearing,³ including issues to determine whether Benchmark had accurately described its Chatom construction efforts. The Highlands proceeding ended with a settlement,⁴ and the questions about Benchmark's efforts and statements regarding Chatom remain unresolved.

Benchmark has already explained itself at great length, most notably in (1) its May 26, 1988 amendment to its Chatom extension application and (2) its March 2, 1989 petition for reconsideration of the cancellation of its permit. These and other materials Benchmark has supplied are on file in FCC File No. BMPH-880325JC, and Benchmark incorporates them by reference herein.

It is nevertheless appropriate for Benchmark to summarize its position with respect to the outstanding questions:

² FCC File No. BPH-891228MT.

³ FCC File No. BPH-890504ME. Hearing Designation Order in MM Docket No. 90-540, Report No. DA 90-1604 (released September 24, 1990).

⁴ Memorandum Opinion and Order in MM Docket No. 90-540, FCC 91M-1391 (released April 23, 1991).

(1) Benchmark acquired the permit for WCCJ (on channel 276A) during protracted rule makings⁵ initiated by other licensees that required at minimum an accommodating substitution and site change for WCCJ. Chatom's ultimate class A channel (channel 291A) was not effective until June 1986,⁶ and its class C3 allotment (channel 291C3) until November 1989.⁷

(2) Despite the continuing uncertainty about what facilities should be built for WCCJ, during its final extension period Benchmark (among other things) finalized site arrangements, completed acquiring transmission equipment, poured the foundation for its tower, and made arrangements for a portable building to house the station. In no way could these efforts be viewed as insubstantial, particularly given the limited time available.

(3) In a petition to deny Benchmark's extension application, a local competitor raised questions about the status of construction, overlooking the tower foundation and incorrectly assuming that the equipment acquired would be stored on-site.

(4) Benchmark admittedly confused matters by describing in its extension application the status of construction it

⁵ See MM Docket Nos. 83-493, 86-55 and 87-432.

⁶ Report and Order in MM Docket No. 85-386, 51 Fed. Reg. 16322 (published May 2, 1986).

⁷ Report and Order in MM Docket No. 86-55, 4 FCC Rcd 7556 (1989).

expected as of the end of the construction permit, rather than as of the date of the application (three weeks earlier). But its projections were made in good faith, and were based upon arrangements it had made with independent suppliers, not all of whom kept their promises. (It should be kept in mind that Benchmark filed its extension application pro se.) Benchmark supplied updated status information in its May 26, 1988 amendment.

(5) But the greatest confusion was caused by the competitor whose petition to deny Benchmark's extension application was essentially speculative. Benchmark's subsequent filings have demonstrated with considerable particularity the diligent and extensive efforts Benchmark made to assemble materials and equipment to construct WCCJ.

In short, based on the record already on file, the questions about Benchmark's efforts and representations should be resolved favorably to Benchmark. However, should additional information be desired, Benchmark's president will make himself available to the staff to answer any questions that may remain.

Highlands, North Carolina. As noted above, in 1989 Benchmark filed an application (File No. BPH-890504ME) for a new FM station at Highlands, North Carolina. Following designation for comparative hearing, Benchmark's application was dismissed pursuant to a universal settlement agreement. Mountain-High Broadcasters, Inc.

(MM Docket No. 90-540), FCC 91M-1391 (ALJ Gonzalez, released April 23, 1991).

Hollywood, Florida. Mr. Meyers previously held an interest in an application for new FM facilities at Hollywood, Florida. To his knowledge and belief, the applicant was Hollywood Hi-Fi Broadcasters, his interest was 20 percent, and the application was dismissed in a settlement with a competing applicant for the same facilities.


CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on this 22nd day of July, 1993, I caused to be placed in the U.S. mail, first class postage prepaid, copies of the foregoing "Supplement to Petition to Deny" addressed to the following:

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